

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company
for Approval of an Agreement Concerning
Certain Generation Assets Known as
“Contra Costa 8” Pursuant to a Settlement and
Release of Claims Agreement Approved by the
Commission on January 14, 2005 for Authority to
Recommence Construction, and for Adoption of
Cost Recovery and Ratemaking Mechanisms
Related to the Acquisition, Completion, and
Operation of the Assets. (U 39 E)

Application 05-06-029
(Filed June 17, 2005)

**ADMINISTRATIVE LAW JUDGE’S RULING
ON PG&E’S MOTION FOR A PROTECTIVE ORDER**

Summary

This Administrative Law Judge(ALJ) Ruling grants in part, and denies in part, Pacific Gas and Electric Company’s (PG&E) motion for approval of a Protective Order (PO) and non-disclosure certificate. The PO is adopted for this proceeding, but only to the extent that parties can comply with the PO without Paragraph 3 of the non-disclosure agreement. Paragraph 3 bans any representative of a market participant that views market-sensitive materials from participating in marketing activities for three years. This ruling does not approve that three-year ban.

Background

On June 17, 2005, PG&E filed an application seeking Commission approval to complete construction and operate a new combined cycle electric generating facility known as Contra Costa 8 (CC8).

On September 8, 2005, PG&E filed a motion for a PO and approval of a non-disclosure certificate setting forth the conditions under which parties to the proceeding could access certain information. Previously, on July 15, 2005, the assigned ALJ granted PG&E's motion for a protective order governing discovery and directed the parties to meet-and-confer and work out the details of a non-disclosure agreement. The PO and non-disclosure agreement submitted by PG&E as a part of its motion was the product of the parties meet-and-confer.

Following the parties collaborative meeting, PG&E circulated the PO and non-disclosure agreement to the service list for comments. Only the Independent Energy Producers Association (IEP) commented on the draft document, objecting to specific language concerning "market participating parties" and what access they would have, and under what conditions, to confidential materials.

PG&E then filed this instant motion. IEP responded raising the same objections that it had to the draft document, and PG&E replied to IEPs comments.

On September 23, 2005, PG&E, The Utility Reform Network (TURN), the Office of Ratepayer Advocates (ORA) and the Coalition of California Utility Employees and California Unions for Reliable Energy filed a joint motion to clarify the scoping memo and adopt a stipulation approved by the moving parties. The parties to the joint stipulation were the parties who had raised issues concerning the Commission's approval of CC8. In sum, the moving

parties have agreed that the scope of the proceeding can be significantly narrowed so that the only issue for decision by the Commission concerns departing loads and the length of time a nonbypassable charge should be imposed for the costs of CC8.

It is not clear yet whether all parties to the proceeding will join in the stipulation or whether there is any opposition to the proposal to limit the scope of the proceeding as set forth above because the time for responses to the joint motion has not run.

Discussion

This ruling will only address PG&E's motion for a PO and a non-disclosure agreement, and not the joint motion on the stipulation.

In regards to the PO motion, it appears that the points of contention between PG&E and IEP center around access by market-participating parties to confidential information and how long the consultants or attorneys from these market-participating parties are banned from engaging in marketing activities. PG&E's PO only allows market-participating parties access to confidential information if they pledge for three years to not engage in marketing activities. IEP proposes an alternative they characterize as "much less oppressive," and that is to follow the Model Protective Order (MPO) that was developed by the Federal Energy Regulatory Commission (FERC). Basically, under the FERC model, parties are accorded access to protected materials if they promise not to disclose the materials and to use them only in connection with the proceeding at hand.

The dispute between PG&E and IEP as described above is not an isolated disagreement between an investor owned utility (IOU) and an independent energy producer (iep). This is an on-going problem facing the Commission in

proceeding after proceeding as a balance is sought between revealing too much of the IOU's market sensitive information so as to put the ratepayers potentially at risk for higher prices, and making the Commission's proceedings open and transparent to ieps and other parties, as well as the public. In fact, this confidentiality impass prompted the Senate to pass Senate Bill (SB) 1488 that instructed the Commission to examine its confidentiality practices. The Commission initiated Rulemaking (R.) 05-06-040 in response to SB 1488, and the Commission's desire and intent is to resolve the thorny confidentiality issues in that proceeding, so that individual ALJs will not be ruling on confidentiality issues, proceeding by proceeding, in a piece-meal fashion that could potentially result in contradictory rulings.

Therefore, it is appropriate to adopt the portions of the PO and non-disclosure agreement presented by PG&E that are not disputed by IEP, and to defer the unresolved issues to the confidentiality rulemaking, R.05-06-040. To wit, the three-year ban that PG&E set forth for reviewing representatives on all market activities if they view market sensitive or proprietary third party information,¹ is not adopted.

This exorcism of the three-year ban should not compromise parties' ability, including IEP and PG&E, to participate fully in this proceeding. Based on the joint motion just submitted to the Commission, the parties who had concerns with PG&E's application, have reached a consensus that the scope of the proceeding is now limited to the issue of the length of nonbypassable charges for departing loads. While IEP did not join in that motion, IEP did not oppose

¹ Paragraph 3 of the non-disclosure certificate sets forth the three-year ban.

PG&E's application. The issues IEP raised in its protest were not directed at the CC8 facility, but were more generically related to procurement procedures and how the IOUs are to proceed to obtain new generating resources. Since that subject is not within the scope of this proceeding, IEP should not need access to PG&E's confidential or market-sensitive data, and the issues revolving around the PO that were offensive to IEP are moot here.

IT IS RULED that Pacific Gas and Electric Company's motion for a protective order and non-disclosure agreement is granted in part, and denied in part. The protective order is granted to the extent that parties can comply with the terms of the protective order without Paragraph 3 of the non-disclosure certificate that bans a market participant that views "market-sensitive" material from engaging in a litany of marketing activities for a period of three-years.

Dated September 29, 2005, at San Francisco, California.

/s/ Carol Brown

Carol Brown
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling on PG&E's Motion for a Protective Order on all parties of record in this proceeding or their attorneys of record.

Dated September 29, 2005, at San Francisco, California.

/s/ Antonina V. Swansen

Antonina V. Swansen

N O T I C E

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